

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BENNY T. WARR and NINA M. WARR,

Plaintiffs,

CA: No. _____

vs.

**COMPLAINT AND
JURY DEMAND**

ANTHONY R. LIBERATORE,
JOSEPH M. FERRIGNO, II,
MITCHELL R. STEWART, II,
JAMES M. SHEPPARD and
CITY OF ROCHESTER,

Defendants.

Plaintiffs Benny T. Warr and Nina M. Warr (hereinafter "Plaintiffs"), by and through their attorney, Burkwit Law Firm, PLLC, as and for their complaint against Defendants Anthony R. Liberatore, Joseph M. Ferrigno, II, Mitchell R. Stewart, II, James M. Sheppard and City of Rochester, allege as follows:

INTRODUCTION

1. This is an action for declaratory judgment, injunctive relief and monetary damages for violations of Plaintiff Benny T. Warr's constitutional rights brought pursuant to 42 U.S.C. 1983, 1985, 1988 and related New York State law claims. Plaintiffs allege that the Defendants, while acting in their official capacities and under color of State law, illegally stopped, searched and arrested Plaintiff Benny T. Warr and used excessive force in effectuating that arrest in violation of the Fourth and Fourteenth Amendments to

the United States Constitution. Plaintiff Benny T. Warr also brings claims against Defendants under New York State Law for battery, assault, intentional infliction of emotional distress or in the alternative, negligent infliction of emotional distress, and negligence, including negligent training, supervision and retention. Plaintiff Nina M. Warr brings a derivative claim for loss of consortium against Defendants. Plaintiff Benny T. Warr further alleges that the Defendant officers conspired to violate his rights under the Fourth and Fourteenth Amendments and that Defendants City of Rochester and James M. Sheppard have demonstrated a custom and policy of deliberate indifference to the constitutional rights of its citizens.

JURISDICTION

2. This action arises in part under 42 U.S.C. Section 1983 and accordingly, this Court has original subject matter jurisdiction under 28 U.S.C. Section 1331. For all remaining claims which do not present a federal question under 28 U.S.C. Section 1331, this Court has supplemental jurisdiction under 28 U.S.C. Section 1367.

3. The causes of action alleged herein arise from the factual allegations which occurred in this judicial district. All parties are domiciled within the Western District of New York and therefore, this Court has personal jurisdiction over the Defendants.

VENUE

4. Venue is proper in the United States District Court for the Western District of New York pursuant to 28 U.S.C. Section 1391 because the events or omissions giving rise to the claim occurred within this District and at all times relevant herein, all parties resided within this District.

PARTIES

5. At all times relevant herein, Plaintiffs Benny T. Warr and Nina M. Warr were and still are residents of the City of Rochester, County of Monroe and State of New York.

6. At all times herein relevant, Plaintiffs Benny T. Warr and Nina M. Warr have been lawfully married and living together as husband and wife.

7. At all times relevant herein, Plaintiff Benny T. Warr has remained a left leg amputee who utilizes a motorized wheelchair for distance transportation purposes.

8. Defendant Anthony R. Liberatore (hereinafter "Defendant Liberatore") is and at all times relevant herein was a citizen of New York State residing in Ontario County and was employed as a police officer with the City of Rochester Police Department.

9. At all times relevant to this Complaint, Defendant Liberatore was acting under color of law and is sued in his individual capacity and in his official capacity as a police officer for the Defendant City of Rochester.

10. Defendant Joseph M. Ferrigno, II (hereinafter "Defendant Ferrigno") is and at all times relevant herein was a citizen of New York State residing in Monroe County and was employed as a police officer with the City of Rochester Police Department.

11. At all times relevant to this Complaint, Defendant Ferrigno was acting under color of law and is sued in his individual capacity and in his official capacity as a police officer for the Defendant City of Rochester.

12. Defendant Mitchell R. Stewart, II (hereinafter "Defendant Stewart") is and at all times relevant herein was a citizen of New York State residing in Monroe County and was employed as a police officer with the City of Rochester Police Department.

13. At all times relevant to this Complaint, Defendant Stewart was acting under color of law and is sued in his individual capacity and in his official capacity as a police officer for the Defendant City of Rochester.

14. Defendant James M. Sheppard (hereinafter "Defendant Sheppard") is and at all times relevant herein was a citizen of New York State residing in Monroe County and was employed as a police officer with the City of Rochester Police Department.

15. At all times relevant to this Complaint, Defendant Sheppard was acting under color of law and is sued in his individual capacity and in his official capacity as a police officer for the Defendant City of Rochester.

16. As Chief of Police for the City of Rochester Police Department, Defendant Sheppard is responsible for the supervision, training and retention of Defendants Liberatore, Ferrigno and Stewart and for making and implementing policies, customs and practices used by law enforcement officers employed by Defendant City of Rochester regarding stops, arrests and the use of force in performance of the acts herein alleged.

17. At all times material to the allegations on this Complaint, Defendants Liberatore, Ferrigno, Stewart and Sheppard were acting in their capacities as police officers employed by Defendant City of Rochester and were acting under color of State law.

18. Defendant City of Rochester is and at all times relevant herein, was and still is a municipal corporation duly organized and existing under the laws of the State of New York with its principal place of business in the County of Monroe, State of New York.

19. Defendant City of Rochester is a political subdivision of the State of New York for which Defendants Liberatore, Ferrigno, Stewart and Sheppard serve as police officers.

20. Defendant City of Rochester is responsible for the hiring, training,

supervision and retention of Defendants Liberatore, Ferrigno, Stewart and Sheppard.

21. Defendant City of Rochester has established and/or delegated to Defendant Sheppard the responsibility for establishing and implementing policies, practices, procedures and customs used by law enforcement officers employed by the City of Rochester regarding stops, arrests and the use of force on persons.

22. At all times herein relevant, Defendants Liberatore, Ferrigno, Stewart and Sheppard were and/or are agents and/or employees of Defendant City of Rochester and were acting within the course and scope of their employment and/or agency in performance of the acts herein alleged.

23. On or about May 20, 2013, Defendant City of Rochester was served with a Notice of Claim detailing its culpability and Plaintiffs' damages. Defendant City of Rochester has failed and refused to make payment to Plaintiffs in accordance with said Notice of Claim.

24. At least thirty (30) days have elapsed since the service of the Notice of Claim upon Defendant City of Rochester and adjustment of payment thereof has been neglected or refused by Defendant City of Rochester.

FACTS

25. All factual allegations contained herein are based upon information and belief, unless affirmatively recited that certain factual allegations are based upon personal knowledge.

26. Unless otherwise stated herein, the sources and grounds for the information and belief for all factual allegations contained in the Complaint are Plaintiffs counsel's own personal conversations with the Plaintiffs and review of the various papers, documents and other materials which Plaintiffs' counsel has reviewed in relation

to this case. If any different or additional sources are the grounds for such information and belief, Plaintiffs' counsel will identify such sources in the body of this Complaint.

27. On May 1, 2013 at approximately 8:15 p.m., Plaintiff Benny T. Warr was sitting in his motorized wheelchair at a bus stop in front of Warrens Pharmacy at or near the northwest corner of Bartlett Street and Jefferson Avenue in the City of Rochester, New York waiting for a southbound bus on Jefferson Avenue.

28. On May 1, 2013 at approximately 8:15 p.m., as Plaintiff Benny T. Warr was sitting in his motorized wheelchair at the bus stop in front of Warrens Pharmacy at or near the northwest corner of Bartlett Street and Jefferson Avenue in the City of Rochester, New York, Plaintiff Benny T. Warr was approached by Defendants Ferrigno and Liberatore who asked him to move.

29. After Defendants Ferrigno and Liberatore asked Plaintiff Benny T. Warr to move from the bus stop in front of Warrens Pharmacy at or near the northwest corner of Bartlett Street and Jefferson Avenue, Plaintiff Benny T. Warr politely responded that he was waiting for the bus.

30. When Plaintiff Benny T. Warr initially told Defendants Ferrigno and Liberatore that he was waiting for the bus, one of the Defendant officers responded "fucking move!".

31. When Plaintiff Benny T. Warr again politely responded to Defendants Ferrigno and Liberatore that he was waiting for the bus, Defendant Ferrigno sprayed mace or pepper spray into Plaintiff Benny T. Warr's face and eyes.

32. After Defendant Ferrigno sprayed mace or pepper spray into Plaintiff Benny T. Warr's face and eyes, Defendant Liberatore or Ferrigno asked the other officer if he was ready to take Plaintiff Benny T. Warr down. Defendant Liberatore then violently pushed Plaintiff Benny T. Warr's motorized wheelchair over causing him to fall over and slam onto the sidewalk on his left side and stump.

33. The incident described in paragraph 32 above was video recorded and

posted on youtube.com by Tache Young, a/k/a Shakur Muhammad.

34. After Plaintiff Benny T. Warr was pushed over by Defendant Liberatore and his body slammed onto the sidewalk, Defendants Liberatore and Ferrigno jumped on, kicked, punched and kneed Plaintiff Warr in the stomach, chest, head, back, neck and other areas of his body while Plaintiff lay on the sidewalk.

35. After Plaintiff Benny T. Warr was pushed over in his wheelchair and was jumped upon, punched, kicked and kneed by Defendants Liberatore and Ferrigno, Defendant Stewart drove up to the incident scene, got out of his police vehicle and grabbed Plaintiff Benny T. Warr, joining Defendants Ferrigno and Liberatore who were kicking, punching, kneeing and/or applying physical force to Plaintiff as he remained laying on the sidewalk.

36. As Plaintiff Benny T. Warr remained laying on the sidewalk, Defendant Ferrigno, Liberatore or Stewart drove his knee into Plaintiff Warr's neck and throat.

37. After Plaintiff Benny T. Warr was maced or pepper sprayed, punched, kicked and kneed numerous times, he was then handcuffed with his arms behind his back and he remained laying on the sidewalk for an extended period of time before an ambulance arrived and he received medical attention for his injuries.

38. In a Rochester Police Department Narrative Report (#2013-0479, CR #13-115259), Defendant Ferrigno admitted to deploying a burst of OC spray to Plaintiff Benny T. Warr's eyes, taking a kneeling position on Plaintiff Warr's front as Plaintiff was laying on his right side, performing 2 to 3 knee strikes to Plaintiff's abdominals, grabbing Plaintiff's left wrist and performing a three (3) point landing on Plaintiff's left side.

39. In a Rochester Police Department Narrative Report (CR#13-115259), Defendant Liberatore admitted to pushing Plaintiff Benny T. Warr's wheelchair over and onto the ground from the right side of the chair, taking his left elbow and performing a downward elbow strike to Plaintiff Benny T. Warr's face and acknowledged that the Plaintiff's head was the closest part of his body and most open to his strike which was

an “untrained technique” according to Rochester Police Department standards. Defendant Liberatore also admitted in said narrative report to administering a mandibular angle pressure point behind Plaintiff Warr's right ear with his right thumb and performing a three (3) point landing on Plaintiff Warr's right side as he proceeded to handcuff Plaintiff Warr with assistance from Defendant Stewart.

40. In a Rochester Police Department Narrative Report (CR#13-115259), Defendant Stewart admitted to taking hold of Plaintiff Benny T. Warr's left arm, pulling it back and handcuffing Plaintiff Warr's left wrist.

41. At no time did Defendants Liberatore, Ferrigno or Stewart wash or clean Plaintiff Benny T. Warr's face after he repeatedly told them his eyes and face were burning due to the pepper spray or mace which was sprayed on Plaintiff Benny T. Warr.

42. Plaintiff Benny T. Warr repeatedly asked Defendants Liberatore, Ferrigno and Stewart to loosen or remove his handcuffs since they were too tight but the handcuffs were not loosened or removed until after Plaintiff Warr arrived at Strong Memorial Hospital for medical treatment.

43. Before and during the aforescribed incident, Plaintiff Benny T. Warr was not engaged in any unlawful activity and he did not resist arrest as Defendants Ferrigno, Liberatore and Stewart proceeded to arrest, search and apply physical force to his person.

44. After Plaintiff Benny T. Warr was handcuffed and laying on the sidewalk, Defendants Liberatore, Ferrigno and/or Stewart laughed and joked about Plaintiff Warr getting his ass kicked. At this point, one of the Defendant officers asked the other two officers what Plaintiff Warr should be charged with. After a several second pause, one of the Defendant officers responded “Let's charge him with disorderly conduct and resisting arrest”.

45. Plaintiff Benny T. Warr was subsequently charged with disorderly conduct and resisting arrest in Rochester City Court based upon accusatory

instruments/supporting depositions which were filed by Defendants Ferrigno and Liberatore and which contained false and fabricated allegations in an effort to justify the disorderly arrest and charges against Plaintiff Benny T. Warr.

46. Plaintiff Benny T. Warr was charged with disorderly conduct, a violation, and resisting arrest, a misdemeanor, in Rochester City Court and an Adjournment In Contemplation of Dismissal was granted by Rochester City Court Judge Stephen T. Miller with respect to both charges with the approval and agreement of the Monroe County District Attorney's Office.

47. Upon information and belief, starting in July 2012, Defendant City of Rochester and Defendant Sheppard implemented an official policy or custom called "Operation Cool Down" whereby City of Rochester police officers, including Defendants Liberatore, Ferrigno, Stewart and Sheppard, were trained, instructed and authorized to aggressively approach, stop and engage citizens on City streets, with or without reasonable suspicion that a crime is occurring, has or will occur, in high crime areas in an effort to deter violence and crime in the City of Rochester.

48. Upon information and belief, Defendant City of Rochester and Defendant Sheppard implemented an official policy or custom called "Clearing the Block" and/or "Clearing the Street" of citizens who assemble on the sidewalks in high crime areas.

49. Upon information and belief, Defendant City of Rochester and Defendant Sheppard implemented an official policy or custom called "Clearing the Block" and/or "Clearing the Street" of citizens who assemble on the sidewalks in the Jefferson Avenue area at the request of local business in that area.

50. Upon information and belief, Defendants City of Rochester and Sheppard have trained their police officers, including Defendants Ferrigno, Liberatore and Stewart, to "Clear the Block" and/or "Clear the Street" of citizens who assemble on the sidewalks in high crime areas in the City of Rochester.

51. Upon information and belief, Defendants City of Rochester and Sheppard have trained their police officers, including Defendants Ferrigno, Liberatore and Stewart, to “Clear the Block” and/or “Clear the Street” of citizens who assemble in front of or in the vicinity of businesses in the Jefferson Avenue/Bartlett Street vicinity.

52. Upon information and believe, Defendants City of Rochester and Sheppard have worked in conjunction with the Jefferson Avenue Business Association who “has tasked them with clearing the block” since clusters of people on the block “kill business” as per Defendant Sheppard.

53. Upon information and belief, Defendant Sheppard has publicly acknowledged that he is walking a “Razor’s Edge” with competing interests between private citizens and local businesses.

54. Upon information and belief, Defendants Ferrigno, Liberatore and Stewart purported to act pursuant to their training and/or the official policies and/or customs of “Operation Cool Down”, “Clearing the Street” and/or “Clearing the Block” when they patrolled the Jefferson Avenue/Bartlett Street intersection on May 1, 2013 and when they approached, stopped, engaged, arrested and/or used physical force on Plaintiff Benny T. Warr while he was stopped at the bus stop.

55. Upon information and belief, Defendants Ferrigno, Liberatore and Stewart utilized their training pursuant to the official policies and/or customs of “Operation Cool Down”, “Clearing the Street” and/or “Clearing the Block” when they patrolled the Jefferson Avenue/Bartlett Street intersection on May 1, 2013 and when they approached, stopped, engaged, arrested and/or used physical force on Plaintiff Benny T. Warr while he was stopped at the bus stop.

56. Upon information and belief, Defendants Ferrigno, Liberatore and Stewart were never reprimanded, suspended or terminated from their employment by Defendant Sheppard or Defendant City of Rochester following the May 1, 2013 incident involving Plaintiff Benny T. Warr and said officers remain on full time active duty patrol

as City of Rochester Police officers.

57. Upon information and belief, Defendants Liberatore, Ferrigno and Stewart had inadequate training and supervision regarding investigatory stops, arrests and reasonable use of force which led to constitutional and New York State law violations in this case.

58. Defendants Sheppard and City of Rochester were aware or should have been aware that the training, policies and practices of "Operation Cool Down", "Clearing the Block" and/or "Clearing the Street" require special training, procedures, policies and customs to be used so as to not infringe upon the legal and constitutional rights of City of Rochester citizens, including Plaintiff Benny T. Warr. The failure to promulgate and implement such procedures, policies or customs led to the violation of Plaintiff Benny T. Warr's legal and constitutional rights and the use of excessive and unreasonable force against his person resulting in Plaintiff Benny T. Warr's injuries and damages.

59. The foregoing actions taken or decisions made by City of Rochester government officials responsible for establishing municipal policies caused the alleged violations of Plaintiff Benny T. Warr's civil rights, his injuries and damages.

60. The policies and practices of "Operation Cool Down", "Clearing the Block" and/or "Clearing the Street" is so persistent and widespread that it constitutes a custom or usage and implies the actual or constructive knowledge of City of Rochester policy-making officials.

61. By and through "Operation Cool Down", "Clearing the Block" and/or "Clearing the Street" and the training given to the Defendant officers, Defendants City of Rochester and Sheppard have given priority to the private economic interests of local business in the City of Rochester over the legal and constitutional rights of City of Rochester citizens, including Plaintiff Benny T. Warr.

62. Based on the foregoing, Defendants City of Rochester and Sheppard

failed to adequately train and supervise Defendants Liberatore, Ferrigno and Stewart.

63. Defendants City of Rochester and Sheppard's failure to properly train and/or supervise their subordinates, including but not limited to Defendants Liberatore, Ferrigno and Stewart amounts to a deliberate indifference to the rights of those with whom City of Rochester employees and officers will come into contact, including Plaintiff Benny T. Warr.

64. As a consequence of the aforescribed May 1, 2013 incident and the unreasonable and excessive force used upon him by Defendants, Plaintiff Benny T. Warr suffered left rib fractures, head pain, headaches, neck pain, back pain, left hand numbness, bilateral shoulder pain, left elbow and arm pain, left hip, leg and stump pain, post traumatic stress disorder, memory loss, blurred vision, chest pain, stomach pain going to the rectum, internal injuries, abrasions and scratches around the wrist since the handcuffs were too tight, burning to the facial area and eyes due to the pepper spray or mace together with other physical injuries. The nature and extent of Plaintiff Benny T. Warr's injuries is unknown as he continues treating for his injuries.

65. As a direct and proximate result of the intentional and/or negligent acts of the Defendants, Plaintiff Benny T. Warr has suffered and continues to suffer serious physical and mental injuries and anguish and pain and suffering and other damages in an amount that will be established at trial.

66. Plaintiff Benny T. Warr is entitled to compensation for the constitutional harms and State law violations that Defendants have inflicted upon him.

CAUSES OF ACTION

COUNT I

VIOLATION OF 42 U.S.C. SECTION 1983 BY DEFENDANTS LIBERATORE, FERRIGNO, STEWART AND CITY OF ROCHESTER FOR ILLEGAL SEARCH AND SEIZURE OF PLAINTIFF BENNY T. WARR'S PERSON

67. The Plaintiffs repeat and reallege the allegations in paragraphs 1 through 66 above and incorporate them by reference as if set forth in their entirety herein.

68. On May 1, 2013 at approximately 8:15 p.m., Defendants Liberatore, Ferrigno and Stewart illegally searched and seized Plaintiff Benny T. Warr's person without probable cause or reasonable suspicion that a crime had been or was being committed in violation of the Fourth Amendment to the United States Constitution.

69. By the actions described in paragraphs 1 through 68 above, Defendants, without a warrant or without probable cause and while acting under color of law, arrested Plaintiff Benny T. Warr and deprived him of certain constitutionally protected rights to be free from unreasonable searches and seizures, the right not to be deprived of liberty without due process of law and the right to be free from false arrest, all in violation of 42 U.S.C. Section 1983 and his Fourth and Fourteenth Amendment rights as guaranteed by the United States Constitution.

70. Defendants Liberatore and Ferrigno were acting under color of state law when they, without probable cause or reasonable suspicion, exercised their authority as police officers by stopping, falsely arresting and searching Plaintiff Benny T. Warr while he was lawfully waiting at a bus stop at or near the northwest corner of Bartlett Street and Jefferson Avenue in the City of Rochester, New York.

71. A reasonable police officer in Defendants Liberatore and Ferrigno's position would not have stopped Plaintiff Benny T. Warr since he was not acting in a manner that would cause a reasonable police officer to have reasonable suspicion or probable cause to believe that a crime had been or was being committed.

72. Plaintiff Benny T. Warr was not free to leave by Defendants Liberatore, Ferrigno and Stewart's show of authority and Plaintiff was therefore seized within the meaning of the Fourth Amendment.

73. By illegally seizing Plaintiff Benny T. Warr, Defendants Liberatore, Ferrigno and Stewart caused Plaintiff Benny T. Warr to suffer a violation of his Fourth Amendment right to be free and secure in his person.

74. Defendant City of Rochester caused Plaintiff Benny T. Warr to be subjected to the Fourth Amendment violation of illegal search and seizure and false arrest because the Defendant officers actions were part of the customary practices of the City of Rochester Police Department.

75. Based upon the foregoing allegations, Defendant City of Rochester and its Police Department have shown a deliberate indifference to an obvious need for training of its officers, including Defendants Ferrigno, Liberatore, Stewart and Sheppard and the failure to adequately train them resulted in the Defendant officers' actions that caused Plaintiff Benny T. Warr's harm.

76. As a direct and proximate result of Defendants' violations of Plaintiff Benny T. Warr's constitutional rights, Plaintiff has suffered serious physical and mental injuries and general and special damages to be proved at trial and is entitled to relief under 42 U.S.C. Section 1983.

77. As a direct and proximate result of the Defendants' conduct, Plaintiff Benny T. Warr has been compelled to retain the services of counsel to protect and enforce his rights and therefore, Plaintiff has incurred and continues to incur attorney's fees, expert fees and costs for which Plaintiff Benny T. Warr is entitled to reimbursement in an amount to be established at the time of trial pursuant to 42 U.S.C. Section 1988.

78. Defendants Liberatore, Ferrigno, Stewart's conduct was willful, malicious, oppressive, outrageous and/or reckless and was of such a nature that Plaintiff Benny T. Warr claims punitive damages against each of them in an amount commensurate with the wrongful acts alleged herein.

COUNT II

VIOLATION OF 42 U.S.C. SECTION 1983 BY DEFENDANTS LIBERATORE, FERRIGNO, STEWART AND CITY OF ROCHESTER FOR USE OF EXCESSIVE FORCE AGAINST PLAINTIFF BENNY T. WARR'S PERSON

79. The Plaintiffs repeat and reallege the allegations in paragraphs 1 through 78 above and incorporate them by reference as if set forth in their entirety herein.

80. Defendants Liberatore, Ferrigno and Stewart illegally used excessive force under the circumstances against Plaintiff Benny T. Warr in violation of his Fourth Amendment right to be free and secure in his person from unreasonable seizures.

81. During the illegal stop, Defendant Ferrigno sprayed mace or pepper spray in Plaintiff Benny T. Warr's face and eyes, Defendant Liberatore violently pushed Plaintiff's motorized wheelchair over causing Plaintiff Benny T. Warr's body to slam onto the sidewalk and Defendants Liberatore, Ferrigno and Stewart punched, kicked, kneed and/or applied unlawful excessive force on Plaintiff Benny T. Warr as previously stated as they proceeded to arrest him.

82. Plaintiff Benny T. Warr did nothing to provoke Defendants Liberatore, Ferrigno or Stewart to use physical force or arrest his person.

83. Defendants Liberatore, Ferrigno and Stewart's conduct under the circumstances was an excessive use of force which a reasonable officer in their position would not have used under the circumstances.

84. Defendant City of Rochester caused Plaintiff Benny T. Warr to be subjected to the Fourth Amendment violation of illegal search and seizure, false arrest and excessive force because the Defendant officers actions were part of the customary practices of the City of Rochester Police Department.

85. Based upon the foregoing allegations, Defendant City of Rochester and its Police Department have shown a deliberate indifference to an obvious need for

training of its officers, including Defendants Ferrigno, Liberatore, Stewart and Sheppard and the failure to adequately train them resulted in the Defendant officers' actions that caused Plaintiff Benny T. Warr's harm.

86. As a direct and proximate cause of the excessive use of force by Defendants Liberatore, Ferrigno and Stewart, Plaintiff Benny T. Warr suffered and continues to suffer serious physical and mental injuries and anguish and other damages in an amount that will be established at trial.

87. As a direct and proximate result of Defendants' violations of Plaintiff Benny T. Warr's constitutional rights, Plaintiff has suffered general and special damages to be proved at trial and is entitled to relief under 42 U.S.C. Section 1983.

88. As a direct and proximate result of the Defendants' conduct, Plaintiff Benny T. Warr has been compelled to retain the services of counsel to protect and enforce his rights and therefore, Plaintiff has incurred and continues to incur attorney's fees, expert fees and costs for which Plaintiff Benny T. Warr is entitled to reimbursement in an amount to be established at the time of trial pursuant to 42 U.S.C. Section 1988.

89. Defendants Liberatore, Ferrigno, Stewart's conduct was willful, malicious, oppressive, outrageous and/or reckless and was of such a nature that Plaintiff Benny T. Warr claims punitive damages against each of them in an amount commensurate with the wrongful acts alleged herein.

COUNT III

VIOLATION OF 42 U.S.C. 1983 (CONSPIRACY TO VIOLATE) BY DEFENDANTS FERRIGNO, LIBERATORE AND STEWART

90. The Plaintiffs repeat and reallege the allegations in paragraphs 1 through 89 above and incorporate them by reference as if set forth in their entirety herein.

91. By and through the actions described in paragraphs 1 through 90

above, Defendants Ferrigno, Liberatore and Stewart, acting under color of state law, conspired to and did deprive Plaintiff Benny T. Warr of his constitutional rights, in violation of 42 U.S.C Section 1983 and his Fourth and Fourteenth Amendment rights as guaranteed by the United States Constitution.

92. Defendants Ferrigno, Liberatore and Stewart conspired amongst themselves to use and did use excessive force against Plaintiff Warr, to unlawfully search, seize and arrest his person and to fabricate a story which would result in Plaintiff Benny T. Warr's wrongful arrest and their own exonerations.

93. Defendants Ferrigno, Liberatore and Stewart agreed to deprive Plaintiff Benny T. Warr of his constitutional rights and did deprive him of his constitutional rights by unlawfully searching, seizing and arresting him and by using unlawful excessive force against his person thus causing serious physical and mental injuries and damages in an amount that will be established at trial.

94. Defendants Liberatore, Ferrigno and Stewart's conduct was willful, malicious, oppressive, outrageous and/or reckless and was of such a nature that Plaintiff Benny T. Warr claims punitive damages against each of them in an amount commensurate with the wrongful acts alleged herein.

COUNT IV

VIOLATION OF 42 U.S.C. SECTION 1983 BY DEFENDANT CITY OF ROCHESTER (FAILURE TO IMPLEMENT POLICIES, CUSTOMS AND PRACTICES)

95. The Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 94 above and incorporates them by reference as if set forth in their entirety herein.

96. By the actions described in paragraphs 1 through 95 above, Defendant City of Rochester has demonstrated a policy, ordinance, custom, regulation and/or

decision of deliberate indifference to the rights of its citizens by:

- a. failing to adequately train its police officers regarding the proper methods for stopping citizens, the use of force, arrest procedures and refraining from participating in conspiracies to violate constitutional rights;
- b. promoting and tolerating a custom and policy in which officers violate the constitutional rights of citizens through excessive force, unlawful stops, searches and seizures and by participating in conspiracies to violate constitutional rights;
- c. failing to suspend, terminate or take disciplinary action against officers who violate rights of citizens by using excessive force, making unlawful stops, searches and seizures and participating in conspiracies to violate constitutional rights; and
- d. failing to adequately supervise officers and retaining officers who are prone to using excessive force, making unlawful stops, searches and seizures and participating in conspiracies to violate constitutional rights.

97. The actions of Defendant City of Rochester were taken under color of law, constitute an official policy or custom of the City of Rochester, deprived Plaintiff Benny T. Warr of a constitutional or statutory right and caused injuries and damages to his person in an amount to be determined at the trial of this action.

98. As a direct and proximate cause of the City of Rochester policy, ordinance, custom, regulation and/or decision or usage of deliberate indifference, Plaintiff Benny T. Warr suffered serious physical and mental injuries, damages and violations of his rights as secured under the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures, false arrest and the use of excessive force.

99. As a direct and proximate result of Defendant City of Rochester's violations of Plaintiff Benny T. Warr's constitutional rights, Plaintiff has suffered general and special damages to be proved at trial and is entitled to relief under 42 U.S.C. Section 1983.

100. As a direct and proximate result of the Defendants' conduct, Plaintiff Benny T. Warr has been compelled to retain the services of counsel to protect and

enforce his rights and therefore, Plaintiff has incurred and continues to incur attorney's fees, expert fees and costs for which Plaintiff Benny T. Warr is entitled to reimbursement in an amount to be established at the time of trial pursuant to 42 U.S.C. Section 1988.

COUNT V

**VIOLATION OF 42 U.S.C. SECTION 1983
BY DEFENDANTS CITY OF ROCHESTER AND JAMES SHEPPARD
(Supervisory Liability/Monell v. Dept. of Social Services,
436 U.S. 658 (1978)), DECLARATORY AND INJUNCTIVE RELIEF**

101. The Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 100 above and incorporate them by reference as if set forth in their entirety herein.

102. At all times relevant herein, Defendant City of Rochester and Chief Sheppard have supervised Defendants Ferrigno, Liberatore and Stewart and are responsible for said officers' retention, training and supervision.

103. Upon information and belief, Defendants Liberatore, Ferrigno and Stewart received training, instructions and authorization from Defendants City of Rochester and Police Chief Sheppard to actively approach, stop and engage citizens on City of Rochester streets with or without reasonable suspicion that a crime is occurring, has or will occur in high crime areas under the official policy or customs of "Operation Cool Down", "Clearing the Block" and/or "Clearing the Street".

104. Upon information and belief, Defendants City of Rochester and Sheppard trained and authorized Defendants Liberatore, Ferrigno and Stewart to engage Rochester citizens on the street and to clear the citizens on blocks and/or streets with or without reasonable suspicion that a crime is occurring, has or will occur when citizens assemble on the sidewalks in high crime areas.

105. Upon information and belief, Defendants City of Rochester and Sheppard trained and authorized Defendants Liberatore, Ferrigno and Stewart to

engage Rochester citizens on the street, including Plaintiff Benny T. Warr, and to clear the blocks and/or streets with or without reasonable suspicion that a crime is occurring, has or will occur when citizens assemble on the sidewalks in the vicinity of Jefferson Avenue and Bartlett Street in the City of Rochester, NY.

106. Upon information and belief, Defendants City of Rochester and Sheppard were “tasked” by the Jefferson Avenue Business Association to clear the blocks and sidewalks of citizens in front of private businesses to promote the private economic interests of local area business.

107. Upon information and belief, Defendant Sheppard has publicly acknowledged that he is walking a “Razor’s Edge” with competing interests between private citizens and business.

108. The official policy or custom and the training and practices of “Operation Cool Down” “Clearing the Block” and/or “Clearing the Street” which Defendants City of Rochester and Sheppard adopted as policy or custom creates a pervasive and unreasonable risk of constitutional injury to citizens, including Plaintiff Benny T. Warr, amounts to a deliberate indifference to or tacit authorization of constitutional injury to citizens and there is an affirmative causal link between said Defendants’ policy or custom of “Operation Cool Down”, “Clearing the Block” and/or “Clearing the Street”, their disregard for the constitutional rights of citizens and the constitutional injuries suffered by Plaintiff Benny T. Warr.

109. Upon information and belief, by and through policy, custom and training, Defendants City of Rochester and Sheppard had actual or constructive knowledge that their subordinates, including Defendants Ferrigno, Liberatore and Stewart were engaged in conduct that posed a pervasive and unreasonable risk of constitutional deprivations and injury to citizens like Plaintiff Benny T. Warr and have condoned this custom, policy and training whereby unconstitutional practices occur.

110. Upon information and belief, Defendants Liberatore, Ferrigno

and/or Stewart had a prior employment history involving alleged misconduct and Defendants City of Rochester and Sheppard were negligent for their training, supervision and retention of said officers.

111. Upon information and belief, despite Defendants City of Rochester and Sheppard's knowledge that their subordinates, including Defendants Ferrigno, Liberatore and Stewart, engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like Plaintiff, their response to said knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices of their subordinates, including the actions of Defendants Liberatore, Ferrigno and Stewart.

112. Upon information and belief, there is an affirmative causal link between the aforescribed culpable action and/or inaction of Defendants City of Rochester and Sheppard and the particular constitutional injuries suffered by Plaintiff Benny T. Warr.

113. As a direct and proximate result of Defendants' violations of Plaintiff Benny T. Warr's constitutional rights, Plaintiff is entitled to relief under 42 U.S.C. Section 1983 and has suffered general and special damages in an amount to be determined at trial.

114. Based upon the foregoing, Plaintiff Benny T. Warr also seeks a declaratory judgment declaring that his constitutional rights to be free from unlawful stops, searches and seizures and excessive force under the Fourth and Fourteenth Amendments were violated by Defendants under the official policy or custom known as "Operation Cool Down", "Clearing the Block" and/or "Clearing the Street".

115. In addition, Plaintiff Benny T. Warr requests a permanent injunction be issued by this Court against Defendants City of Rochester and Sheppard declaring that the policies and customs of "Operation Cool Down", "Clearing the Block" and/or "Clearing the Street" are unconstitutional since said policies or customs violate and

infringe upon the constitutional rights of City of Rochester citizens to be free from unlawful stops, searches and seizures and excessive force as demonstrated by the circumstances of this action.

116. As a direct and proximate result of the Defendants' conduct, Plaintiff Benny T. Warr has been compelled to retain the services of counsel to protect and enforce his rights and therefore, Plaintiff has incurred and continues to incur attorney's fees, expert fees and costs for which Plaintiff Benny T. Warr is entitled to reimbursement in an amount to be established at the time of trial pursuant to 42 U.S.C. Section 1988.

117. Defendant Sheppard's conduct was willful, malicious, oppressive and/or reckless and was of such a nature that Plaintiff Benny T. Warr claims punitive damages against Defendant Sheppard in an amount commensurate with the wrongful acts alleged herein.

COUNT VI

BATTERY BY DEFENDANTS LIBERATORE, FERRIGNO, STEWART AND CITY OF ROCHESTER

118. The Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 117 above and incorporates them by reference as if set forth in their entirety herein.

119. The aforesdescribed actions of Defendants Liberatore, Ferrigno and Stewart constitute an intentional battery upon Plaintiff Benny T. Warr's person.

120. Defendant Ferrigno committed a battery upon Plaintiff Benny T. Warr's person by intentionally spraying Plaintiff Benny T. Warr's face with mace or pepper spray, punching, kneeling and striking and kicking Plaintiff over many areas of his body and placing Plaintiff in handcuffs.

121. Defendant Liberatore committed a battery upon Plaintiff Benny T.

Warr's person by pushing his motorized wheelchair over causing Plaintiff's body to slam onto the sidewalk, punching, kneeing and striking and kicking Plaintiff over many areas of his body, by performing a downward elbow strike into Plaintiff Benny T. Warr's face when Plaintiff was on the ground, inflicting pain by administering a mandibular angle pressure point behind Plaintiff Warr's right ear and by placing Plaintiff in handcuffs.

122. Defendant Stewart committed a battery upon Plaintiff Benny T. Warr's person by grabbing Plaintiff's left arm, pulling it back and handcuffing Plaintiff, and by grabbing, pushing and striking Plaintiff's body.

123. The battery committed upon Plaintiff Benny T. Warr by Defendants was without provocation by Plaintiff Benny T. Warr and without his consent.

124. As a direct and proximate result of the battery committed upon his person by Defendants, Plaintiff Benny T. Warr suffered severe and permanent physical and mental injuries and damages in an amount to be determined at trial.

125. Defendant City of Rochester is liable under the doctrine of Respondeat Superior for the acts and omissions of its employees and/or agents Defendants Liberatore, Ferrigno and Stewart who were purporting to act or were acting in the course and scope of their employment as police officers with Defendant City of Rochester when the alleged battery was committed upon Plaintiff Benny T. Warr's person.

126. Defendants alleged actions were excessive, malicious, oppressive, reckless, wanton and in wilfull disregard of Plaintiff Benny T. Warr's rights that Plaintiff claims punitive damages against Defendants Ferrigno, Liberatore and Stewart in an amount to be determined at trial commensurate with the wrongful acts alleged herein.

COUNT VII

**ASSAULT BY DEFENDANTS LIBERATORE, FERRIGNO, STEWART
AND CITY OF ROCHESTER**

127. The Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 126 above and incorporates them by reference as if set forth in their entirety herein.

128. The aforescribed actions of Defendants Liberatore, Ferrigno and Stewart constitute an intentional assault upon Plaintiff Benny T. Warr's person.

129. Defendants Ferrigno and Liberatore intentionally placed Plaintiff Benny T. Warr in fear of imminent, harmful or offensive contact when said officers told Plaintiff that they were going to "take him down" and when they pepper sprayed or maced him and violently pushed his motorized wheelchair over and applied excessive physical force to his person.

130. Defendant Stewart intentionally placed Plaintiff Benny T. Warr in fear of imminent, harmful or offensive contact by grabbing Plaintiff's left arm, pulling it back, handcuffing Plaintiff and grabbing, pushing and striking Plaintiff's body.

131. Defendants Ferrigno, Liberatore and Stewart made an intentional attempt, displayed by violence or threatening gesture, to do injury to or commit a battery upon Plaintiff Benny T. Warr's person.

132. The assaults committed upon Plaintiff Benny T. Warr by Defendants Ferrigno, Liberatore and Stewart were without provocation by Plaintiff Benny T. Warr.

133. Defendant City of Rochester is liable under the doctrine of Respondeat Superior for the acts and omissions of its employees and/or agents Defendants Liberatore, Ferrigno and Stewart who were purporting to act or acting in the

course and scope of their employment as police officers with Defendant City of Rochester when the alleged assaults were committed upon Plaintiff Benny T. Warr's person.

134. As a direct and proximate result of the assaults committed upon his person, Plaintiff Benny T. Warr suffered severe and permanent injuries and damages in an amount to be determined at trial.

135. Defendants Liberatore, Ferrigno and Stewart's actions were oppressive, malicious, reckless, wanton and in wilfull disregard of Plaintiff Benny T. Warr's rights that Plaintiff claims punitive damages against Defendants Ferrigno, Liberatore and Stewart in an amount to be determined at trial commensurate with the wrongful acts alleged herein.

COUNT VII

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BY DEFENDANTS LIBERATORE, FERRIGNO, STEWART AND CITY OF ROCHESTER

136. The Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 135 above and incorporate them by reference as if set forth in their entirety herein.

137. Defendants Liberatore, Ferrigno and Stewart, by and through their aforescribed conduct, intentionally inflicted emotional distress upon Plaintiff Benny T. Warr through their tortious conduct as alleged in this complaint.

138. Defendants Liberatore, Ferrigno and Stewart owed a duty of care to Plaintiff Benny T. Warr to use reasonable care to avoid causing him severe emotional distress.

139. The assaults and/or batteries committed upon Plaintiff Benny T. Warr by Defendants were intentional and in reckless disregard of the probability of causing

Plaintiff severe emotional distress and these acts did in fact cause and result in severe and extreme emotional distress to the Plaintiff.

140. The Defendants' conduct alleged herein transcend the bounds of human decency and constitute shocking and outrageous conduct that shocks the conscience of any civilized society.

141. As a direct and proximate result of the intentional infliction of emotional distress committed by Defendants upon the Plaintiff, the Plaintiff has and continues to suffer great fear, anxiety, emotional distress, mental anguish, embarrassment, humiliation, fear of being stalked and attacked by police officers, inability to function effectively in his daily life in an amount to be determined at trial.

142. Defendant City of Rochester is liable under the doctrine of Respondeat Superior for the acts and omissions of its employees and/or agents Defendants Liberatore, Ferrigno and Stewart who were purporting to act or were acting in the course and scope of their employment Defendant City of Rochester when the alleged intentional inflictions of emotional distress were committed upon Plaintiff Benny T. Warr.

143. Defendants Liberatore, Ferrigno and Stewart's actions were malicious, reckless, wanton and in wilfull disregard of Plaintiff Benny T. Warr's rights that Plaintiff claims punitive damages against Defendants Ferrigno, Liberatore and Stewart in an amount to be determined at trial commensurate with the wrongful acts alleged herein.

COUNT VIII

NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS BY DEFENDANTS LIBERATORE, FERRIGNO, STEWART AND CITY OF ROCHESTER

144. The Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 143 above and incorporate them by reference as if set forth in their entirety herein.

145. In the event that it is determined that Defendants Liberatore, Ferrigno and Stewart, by and through their aforescribed conduct as alleged in this Complaint, did not intentionally inflict emotional distress on Plaintiff Benny T. Warr, in the alternative, said Defendants' conduct amounts to a negligent infliction of emotional distress upon Plaintiff Benny T. Warr.

146. The Defendants owed a duty of care to Plaintiff Benny T. Warr to use reasonable care to avoid causing him severe emotional distress.

147. The actions of Defendants Liberatore, Ferrigno and Stewart in using force upon Plaintiff Benny T. Warr were done negligently and in reckless disregard of the probability of causing Plaintiff severe emotional distress and these acts did in fact cause and result in severe and extreme emotional distress to the Plaintiff.

148. The Defendants conduct alleged herein transcend the bounds of human decency and constitute shocking and outrageous conduct that shocks the conscience of our society.

149. As a direct and proximate result of the negligent infliction of emotional distress committed by Defendants upon Plaintiff Benny T. Warr, Plaintiff Benny T. Warr has and continues to suffer great fear, anxiety, emotional distress, mental anguish, embarrassment, humiliation, fear of being stalked and attacked by police officers, inability to function effectively in his daily life in an amount to be determined at trial.

150. Defendant City of Rochester is liable under the doctrine of Respondeat Superior for the acts and omissions of its employees and/or agents

Defendants Liberatore, Ferrigno and Stewart who were purporting to act or acting in the course and scope of their employment as police officers with Defendant City of Rochester when the alleged negligent infliction of emotional distress was committed upon Plaintiff Benny T. Warr's person.

151. Defendants Liberatore, Ferrigno and Stewart's actions were oppressive, reckless, wanton and in wilfull disregard of Plaintiff Benny T. Warr's rights that Plaintiff claims punitive damages against Defendants Ferrigno, Liberatore and Stewart in an amount to be determined at trial commensurate with the wrongful acts alleged herein.

COUNT VIII

NEGLIGENCE BY ALL DEFENDANTS

152. The Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 151 above and incorporates them by reference as if set forth in their entirety herein.

153. In the event it is determined that the alleged actions of Defendants were not intentional, in the alternative, Defendants negligently inflicted physical force and injury on Plaintiff Benny T. Warr's person as alleged above.

154. Defendants owed a duty of care to Plaintiff Benny T. Warr to act in a lawful manner and to not use excessive physical force when they approached, restrained and arrested him.

155. Defendants breached this duty of care by permitting excessive physical force to be applied under the circumstances to Plaintiff Benny T. Warr's person causing him physical and mental injuries and damages in an amount to be determined at trial.

156. Upon information and belief, Defendant City of Rochester was negligent by failing to properly investigate the defendant officers before hiring

them.

157. Upon information and belief, Defendants City of Rochester and Sheppard negligently instructed, trained, supervised and retained Defendants Liberatore, Ferrigno, Stewart and Sheppard resulting in the tortious and unlawful conduct as set forth in this complaint.

158. Defendants City of Rochester and/or Sheppard owed a duty of care to Plaintiff Benny T. Warr to properly investigate their police officers at the time of hiring and upon information and belief, failed to do so.

159. Defendants City of Rochester and Sheppard owed a duty of care to Plaintiff to properly instruct, train and supervise their officers including Defendants Ferrigno, Liberatore and Stewart.

160. Defendants City of Rochester and Sheppard breached their duty of care to Plaintiff Benny T. Warr by failing to properly investigate Defendants Liberatore, Ferrigno and Stewart prior to their hiring.

161. Defendants City of Rochester and Sheppard breached their duty of care to Plaintiff Benny T. Warr by failing to adequately train and supervise Defendants Liberatore, Ferrigno and Stewart.

162. Upon information and belief, Defendants City of Rochester and Sheppard breached their duty of care to Plaintiff Benny T. Warr by retaining Defendants Liberatore, Ferrigno and/or Stewart after learning of their propensity to act in an unlawful and unauthorized manner by applying excessive physical force during encounters with other persons.

163. As a direct and proximate result of Defendants' negligence as alleged herein, Plaintiff Warr suffered severe and permanent physical and mental injuries and damages in an amount to be determined at trial.

164. Defendants alleged actions were oppressive, malicious, reckless, wanton and in wilfull disregard of Plaintiff Benny T. Warr's rights and Plaintiff claims punitive

damages should be imposed in an amount to be determined at trial commensurate with the wrongful acts alleged herein.

COUNT IX

LOSS OF CONSORTIUM AGAINST ALL DEFENDANTS

165. Plaintiffs repeat and reallege paragraphs 1 through 164 as if set forth in their entirety herein.

166. At all times relevant herein, Plaintiff Nina M. Warr was and still is the lawful wife of Plaintiff Benny T. Warr and as such, is entitled to his companionship, society and consortium.

167. As a result of Defendant's intentional and/or negligent conduct inflicted upon Plaintiff Benny T. Warr as alleged in this Complaint, Plaintiff Nina M. Warr has been denied the services and consortium of her husband, Plaintiff Benny T. Warr and was required to render care and services due to his injuries, and has suffered damages in an amount to be determined at the trial of this action.

WHEREFORE, Plaintiffs Benny T. Warr and Nina M. Warr pray for judgment against Defendants as follows:

1. Compensatory damages in the form of general and special damages against all Defendants, jointly and severally, in an amount that has yet to be ascertained and according to the proof;
2. Punitive damages against all individual Defendants;
3. Declaratory judgment declaring that Plaintiff Benny T. Warr's constitutional rights to be free from unlawful stops, searches and seizures and excessive force under the Fourth and Fourteenth Amendments were violated by Defendants under the official policy or custom known as "Operation Cool Down", "Clearing the Block" and/or "Clearing the Street";

4. Declaratory judgment declaring that the policies and customs of "Operation Cool Down", "Clearing the Block" and/or "Clearing the Street" are unconstitutional since said policies or customs violate and infringe upon the constitutional rights of City of Rochester citizens to be free from unlawful stops, searches and seizures and excessive force as demonstrated by the circumstances surrounding this action;
5. Injunctive relief restraining and prohibiting Defendants City of Rochester and Sheppard from authorizing and permitting City of Rochester police officers to aggressively approach, stop and engage citizens on City of Rochester Streets, without reasonable suspicion that a crime is occurring, has or will occur as said policy or custom violates and infringes upon the constitutional rights of City of Rochester citizens to be free from unlawful stops, searches and seizures and excessive force.
6. Costs of suit incurred herein;
7. An award of reasonable attorney's fees pursuant to 42 U.S.C. Section 1988; and
8. Such other and further relief as this Court may deem just and proper.

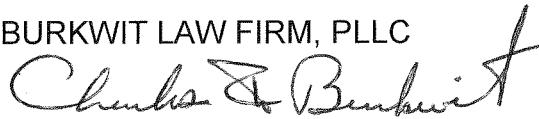
DEMAND FOR JURY TRIAL

A jury trial is hereby demanded.

Dated: September 19, 2013

Respectfully submitted,

BURKWIT LAW FIRM, PLLC



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